United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC DOCKET NO. 99-1836
RIVERDALE MILLS CORPORATION, Respondent.	:	

APPEARANCES:

Paul J. Katz, Esquire Boston, Massachusetts For the Complainant.	Warren G. Miller, Esquire Boston, Massachusetts For the Respondent.

BEFORE: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) ("the Act"), to review (1) citations issued by the Secretary of Labor pursuant to section 9(a) of the Act, and (2) proposed assessments of penalties pursuant to section 10(a) of the Act. On April 2, 1999, an employee of Respondent was injured while operating a machine called a Peck Shear and Flattener. As a result of the accident, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of the site, after which Respondent was issued a two-item serious citation alleging violations of 29 C.F.R. §§ 1910.138(b) and 1910.212(a)(1) and proposing a total penalty of

$4,900.00. Respondent timely contested the citation, and, following the filing of a complaint and answer and pursuant to a notice of hearing, the case was heard in Worcester, Massachusetts on February 16 and 17, 2000. Both parties have filed post-trial briefs.

Jurisdiction

The parties agree that Respondent, Riverdale Mills Corporation, is an employer engaged in interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5), and that the Commission has jurisdiction over this case.

Stipulations

The parties stipulated to the following, as set out in Exhibit ALJ-1:

1. The parties agree that the OSHRC has jurisdiction of this matter and that Respondent is a covered employer within the meaning of the Act.

2. This case involves alleged violations of the Act on or about April 2, 1999 at its manufacturing place of business at Northbridge, Massachusetts.

3. Respondent employed approximately 150 persons. Among these employees on or about April 2, 1999 were:

James Knott, Sr.	President, CEO
Jacqueline Boutin	Head of Human Resources/Safety
Ronna Dugdale	Machine Operator
Judith Pare	Operator of Peck Shear
Priscilla Beauregard	Lead Shear Operator
Dennis Meola	Supervisor, First Shift
David Geeza	Plant Manager[1]
Norman Baillargeon	Supervisor, Second Shift
Paul DiMauro	Chief of Maintenance
Panages Bebedelis	Machine Operator, Injured employee
Nestor Cabrera	Material Handling Man
Michael Martel	Coating Line Lead Man
Mark Lyon	Maintenance Man

4. The two OSHA investigators to inspect Respondent's workplace in this action are Theresa Dann and Nelson Barnes.

[1]Although the stipulations list Mr. Geeza and Mr. Knott both as President, Mr. Geeza stated at the trial that he was the plant manager. (Tr. 336).

5. The Peck Shear and Flattener serves two functions. This matter concerns only the flattening function of the Peck machine. The Peck machine is used for flattening wire only about 12 hours a month. One customer of Respondent requires that the curvature (or bow) in the rectangular sections of the wire (or panels) be flattened out. In this operation, the operator feeds (at about belt level) a rectangle of galvanized wire into the flattener portion of the Peck machine. The employee stands at a particular operator station to perform this task, as opposed to his position when operating the machine as a shear for rolls of wire mesh, as opposed to panels.

6. A trip cord has always existed just above the rollers of the Peck machine. Touching this wire anywhere shuts the flattener down.

7. Complainant in this action contends and Respondent disputes that the employee operating the flattener task is exposed to the hazard of having his fingers drawn into the machine, and that Respondent should install a guard to prevent this eventuality from occurring.

Respondent asserts that (1) a guard is not needed, (2) a guard (the trip wire) was already in place, (3) any other guard is infeasible, and (4) any additional guard would create a greater hazard. Respondent contends that the accident was attributable to employee misconduct, inattention, and failure to observe operating instructions he had been trained to observe.

8. On April 2, 1999, employee, Panages Bebedelis injured himself while operating the Peck flattener.

9. No Final Orders of the Occupational Safety and Health Review Commission exist as to Respondent's workplace.

The Accident

Respondent, a wire mesh manufacturer, utilizes a machine called the Peck Shear and Flattener ("the Peck machine") to cut wire mesh from rolls into panels and to flatten the wire mesh panels. The flattening operation at issue in this proceeding is performed only about 12 hours a month because Respondent has one or two customers that require the wire mesh panels they purchase to be flattened in order to eliminate the bow or curvature in the panels. (Stipulation 5).

On April 2, 1999, Panages Bebedelis, Respondent's employee, was operating the flattener function of the Peck machine. In particular, he was feeding galvanized wire mesh panels 70 inches wide by 22 inches long between the flattener's upper roller and lower roller, which rotate parallel to

each other but in opposite directions, thereby grabbing and pulling the panel being fed into the flattener. To perform this work, Mr. Bebedelis fed each panel into the rollers at a slight angle and then pushed down on the panel as it was being pulled into the machine. He also wore gloves while doing this work to keep his hands from being lacerated or punctured by the panels, which were coarse and had sharp edges. The accident occurred as Mr. Bebedelis was feeding a panel into the machine and a shirt sleeve or a glove caught on the panel. His hand was pulled into the rollers before another employee was able to shut the machine off, and, as a result, three of his fingers were broken.[2] (Tr. 61, 106-07, 112-14, 121-22, 156, 410-11).

After learning about this incident from the local police department, Compliance Officer ("CO") Theresa Dann and her supervisor, Nelson Barnes, investigated the accident from April 26-28, 1999. (Tr. 147-51). As a result of their investigation, OSHA issued the subject citation.

The Relevant Testimony

Priscilla Beauregard, the lead operator on the Peck machine, testified that she had trained Mr. Bebedelis on the machine and told him that it was optional to wear gloves to protect his hands from the wire mesh panels. She further testified that she herself did not wear gloves because if they got caught on a panel, her hands would be pulled into the machine and her fingers could be broken or crushed as a result; however, she said that many other operators wore gloves to protect their hands. Ms. Beauregard confirmed that at her deposition she had stated that if gloves were caught on a wire mesh panel, there would not be enough time to get one's hands out. She noted that after the accident, Respondent had changed its policy so that only fingerless gloves could be worn when operating the Peck machine. (Tr. 36-39, 49-54, 70).

Judith Pare, a Peck machine operator, testified that when she operated the machine she pressed her hand on top of the panel to flatten it to facilitate its insertion in between the rollers. She further testified that operators needed to concentrate in order to not get their hands pulled into the rollers if a glove or a part of a shirt happened to catch on a sharp spot on the panel. Ms. Pare said that she herself wore gloves to protect her hands from the sharp edges and spots on the panels. She also

[2]At the trial, Respondent objected to the admission of statements Mr. Bebedelis made to the CO. However, as my findings do not rely on his statements, I need not determine this issue.

said that after the accident, Respondent installed a guard on the Peck machine. Ms. Pare stated that the purpose of the guard was safety. (Tr. 83-91, 94, 99).

Ronna Dugdale, another machine operator, testified that when she operates the Peck machine she normally puts her hand in the middle of the mesh panel to flatten it so that the panel can be inserted into the machine. She also testified that she does not wear gloves anymore because when she did they got caught on the mesh panel. (Tr. 325-30).

Nestor Cabrera, an employee who was working with Mr. Bebedelis, witnessed the accident. He testified that Mr. Bebedelis was pushing down on the panel to get it in between the rollers and was talking to him as he did so, and he noted that it was well known in the plant that Mr. Bebedelis was a "talker." He further testified that Norman Baillargeon, a supervisor, told Mr. Bebedelis to "pipe down" and get back to work but that Mr. Bebedelis continued to talk. According to Mr. Cabrera, Mr. Bebedelis' hand got caught in the machine while he was talking, and he (Mr. Cabrera) reached over and hit the trip wire to turn the machine off. Mr. Cabrera stated that Mr. Bebedelis did not hit the trip wire or the switch on the control box because "everything happened so fast" and he was "pretty excited." Mr. Cabrera also stated that before the accident, all of the other machines had guards. (Tr. 103-07, 111-14, 119-24, 128).

Theresa Dann, the OSHA CO, testified that she investigated the accident after receiving a referral from the local police department and that after she visited the plant on three consecutive days the company refused to allow her to return for any further investigation. She said that at the time of the accident there was no physical barrier or guard to protect employees' hands from the Peck machine's ingoing nip points, which she defined as areas where rotating objects, such as rollers, run toward each other. She also said that training was insufficient to protect employees from ingoing nip points because injuries could result from inattention. The CO stated that a guard was in place on the Peck machine at the time of her inspection and that David Geeza and Priscilla Beauregard both told her that the funnel device on the machine was a guard. According to the CO, this guard was not sufficient to abate the hazard and the guard's opening needed to be narrowed and placed further back toward the operator. (Tr. 147-56, 159-60, 175-77, 292).

CO Dann also testified that Respondent gave its employees the option of wearing gloves, even though its employee manual prohibited the use of gloves around moving parts of machinery, and that

wearing gloves increased the likelihood an operator might be injured. She said the machine guarding violation and the failure to provide appropriate hand protection violation were related in that the use of gloves on the unguarded machine created a hazard. (Tr. 190-92, 196, 287-92 C-3).[3]

David Geeza, the plant manager, testified that he overheard Mr. Bebedelis talking loudly when the accident occurred and that he had noticed Mr. Bebedelis talking loudly in the past. Although Mr. Geeza had spoken to Mr. Bebedelis about talking too much, he had never disciplined Mr. Bebedelis in this regard. (Tr. 337, 349-50).

Paul DiMauro, the plant maintenance manager, testified that a funnel device and a light curtain were installed on the Peck machine after the accident. He further testified that funnel devices were installed on all the other machines before the accident. According to Mr. DiMauro, the funnel devices did not protect employees, but, rather, created an "equal hazard." (Tr. 135-40).

James Knott, Respondent's president and CEO, testified that it was not feasible to guard the Peck machine and that only "training, training, training" could make the machine safer. He further testified that the barrier guard the CO recommended could amputate fingers if the hand got caught. According to Mr. Knott, the funnel device was installed on the Peck machine to improve productivity, and the light curtain was installed with a footpad because the mesh panel would interfere with the light curtain. (Tr. 364-65, 372, 380).

Jacqueline Boutin, Respondent's human resource manager, is responsible for general safety training at the plant. She testified that the company policy gave employees the option of wearing gloves and that this policy had been developed by observation. (Tr. 399, 430).

The Secretary's Burden of Proof

In order to establish a violation of a specific standard, the Secretary must show by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) there was a failure to meet the terms of the standard; (3) employees had access to the violative condition; and (4) the employer either knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Halmar Corp.*, 18 BNA OSHC 1014, 1016 (No. 94-2043, 1997); *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 20-1747, 1994).

[3]Complainant's and Respondent's exhibits are identified as "C" and "R," respectively.

Serious Citation 1, Item 1 – Proposed Penalty: $2,450.00

This item alleges a violation of 29 C.F.R. § 1910.138(b), which provides as follows:

> Employers shall base the selection of the appropriate hand protection on an evaluation of the performance characteristics of the hand protection relative to the task(s) to be performed, conditions present, duration of use, and the hazards and potential hazards identified.

The Secretary asserts that Respondent failed to base its selection of the gloves its employees wore to operate the Peck machine on an evaluation of the performance characteristics of the gloves relative to the tasks to be performed and the hazards identified, as required by the standard. The Secretary further asserts that Respondent did not actually evaluate its hand protection policy until after the accident. Respondent contends that it satisfied the requirements of the standard by providing employees gloves to use when handling the wire mesh panels to protect their hands from injuries contemplated by the standard, such as cuts, abrasions and punctures.

The standard specifically requires the employer to base its selection of appropriate hand protection on an evaluation of not only the tasks to be performed but also on the "hazards and potential hazards identified." At the time of the accident, Respondent had a written rule prohibiting the use of gloves near moving machinery. (Tr. 185; C-3). However, Respondent gave employees the option of wearing gloves while operating the flattener function of the Peck machine to protect their hands from cuts, abrasions and punctures.[4] (Tr. 190-91). Respondent's policy of allowing employees to wear gloves if they wanted to when using the flattener was clearly contradictory to the work rule prohibiting the use of gloves near moving machinery. The company properly identified the hazard of wearing gloves near moving machinery, and it also properly identified the hazard of cuts, abrasions and punctures from handling the wire mesh panels. However, instead of evaluating these two hazards in conjunction and devising work rules that would give clear instructions to employees and provide protection against both hazards, Respondent had a policy that was by its own terms contradictory and

[4]Although Jacqueline Boutin, Respondent's human resources manager, initially testified that "there was no policy of not wearing gloves" for operating the flattener, she then testified that the policy was that employees could wear gloves if they wanted to and that the company had developed this policy by observation. (Tr. 430).

that put employees in the position of having to choose between the hazard of broken fingers and/or crushed hands and hazards such as cuts, abrasions and punctures.

Testimony in the record illustrates the employees' dilemma. Priscilla Beauregard, the lead operator who trained other employees on the machine, testified that the gloves could catch on the wire panels and pull employees' hands into the machine. She also testified that the rollers could break fingers or crush hands, and that she did not wear gloves due to this hazard. (Tr. 37, 39, 50-51). Ronna Dugdale, another employee who operated the machine, did not wear gloves for the same reason, but she and Ms. Beauregard testified that most of the employees who used the machine wore gloves. (Tr. 49-50, 329-31). Judith Pare, another Peck machine operator, testified that she wore gloves to protect her hands despite the danger of injury if a glove were to catch on a panel and pull her hand into the rollers. (Tr. 89-91). Mr. Bebedelis also wore gloves, and, as noted above, he was injured when a glove or sleeve caught on the wire panel and his hand was pulled into the machine.

Based on the evidence of record, the Secretary has established the applicability of the standard, noncompliance with the standard's terms and employee access to the violative condition. The Secretary has also established Respondent's knowledge of the condition, particularly in light of the company's own contradictory work rules. Respondent's written rule prohibiting the use of gloves near moving machinery and its subsequent modification of that rule allowing operators to wear gloves demonstrate Respondent's actual knowledge of the violative condition. However, even if Respondent had not had these contradictory work rules, the violative condition was clearly detectable in the exercise of reasonable diligence, in that most if not all of the operators were aware of the hazard of wearing gloves while using the Peck machine.

Finally, the Secretary has established that the violation was serious. There was a substantial probability that the cited condition could have resulted in serious physical harm. Although Respondent's failure to require employees to use gloves when handling the wire panels was not likely to cause serious injuries, its failure to enforce its rule prohibiting the use of gloves near moving machinery could have caused, and did cause in this case, serious injuries such as broken fingers or crushed hands. Moreover, the company's failure to properly evaluate the work being done and the hazards the work presented contributed to the serious nature of the violation, especially since most

of the employees who used the machine chose to wear gloves. This citation item is accordingly affirmed as a serious violation. The penalty assessed for this item is set out *infra*.

Serious Citation 1, Item 2 – Proposed Penalty: $2,450.00

This item alleges a violation of 29 C.F.R. § 1910.212(a)(1), which states as follows:

> *Machine guarding–(1) Types of guarding*. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are–barrier guards, two-hand tripping devices, electronic safety devices, etc.

The Secretary contends that the trip wire located just above the rollers on the flattener was an insufficient means of protection from the ingoing nip point of the flattener and that Respondent violated the standard. Respondent contends that the Secretary has not met her burden of proving a violation, asserting that the trip wire provided adequate protection from the flattener's rollers and was an acceptable guarding means. Respondent also contends that any other means was infeasible and a greater hazard, and that the accident was due to unpreventable employee misconduct.

Respondent maintains that the Secretary has failed to meet her burden of proving that there is an ingoing nip point between the flattener's rollers, asserting that, because the rollers are offset and never come into contact with each other, there is no nip point. I disagree. Although the standard itself does not define the term "nip point," Respondent's assertion that the rollers must come into contact with each other in order to fall within the definition of a nip point is simply unpersuasive, and Respondent offers nothing in support of its position. I find the CO's definition of a nip point more convincing. According to the CO, a nip point can be created by two rollers coming together, one running clockwise, the other running counterclockwise. (Tr. 230). The CO also testified that there is no requirement that the rollers come in direct contact with one another; rather, close proximity is enough to create a nip point. *Id.* I am persuaded that this description falls within the definition of an ingoing nip point as contemplated by the standard. Regardless, even assuming *arguendo* that Respondent's position is correct, I would nonetheless find a violation. The standard sets out several types of hazards that machine operation may present, including "point of operation" and "rotating parts" hazards, either of which could apply to the rollers of the flattener in this case.

Respondent also maintains that the standard requires only one method of guarding and that the trip wire on the Peck machine met the standard. Again, I disagree. First, although the standard gives the employer flexibility in choosing an appropriate guarding method, it explicitly requires "one or more" guarding methods to be provided to protect the operator and other employees from hazards created by machine operation. Second, accepting Respondent's argument would allow an employer to utilize any one method on any machine, regardless of whether that method actually provided adequate protection for employees. Third, it is clear from the accident in this case that the trip wire on the Peck machine did not satisfy the standard. Although Respondent asserts that the trip wire is a "two-handed tripping device" as described in the standard, I find that it is not. The term "two-handed tripping device" clearly suggests a device that requires two hands to activate the machine, thus keeping an operator's hands out of the machine's operation. The trip wire, on the other hand, shuts the flattener down when it is touched "anywhere." *See* Stipulation 6. I find that the Secretary has satisfied her burden of showing Respondent's failure to meet the terms of the standard.

The Secretary has also met her burden of showing employee access to the violative condition and employer knowledge of the condition. It is undisputed that employees had access to the violative condition at least 12 hours a month. *See* Stipulation 5. Furthermore, Respondent clearly had knowledge of the condition. Respondent emphasized to its employees how dangerous the machine was and how important it was for employees to concentrate while operating the machine. (Tr. 37-39, 90-91, 94-95, 99, 350). Accordingly, based on the evidence of record, the Secretary has satisfied her burden of proving all elements of her prima facie case.

As indicated above, Respondent contends that the trip wire was the only feasible means of guarding that would not destroy the flattener's functional utility.[5] To prove the affirmative defense of infeasibility of compliance, the employer must show that (1) literal compliance with the standard was infeasible under the circumstances and that (2) either an alternate means of protection was used or no alternate means was feasible. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1160 (Nos. 90-1620

[5]In Respondent's post-trial brief, Respondent urges this court to accept its analogy of the Peck machine to three-roller printing ink mills. (R. Brief, pp. 9-10). Respondent has not demonstrated why such an analogy is applicable in this matter. Without showing that the features of the two machines are similar, the safety standards applicable to three-roller printing ink mills cannot be relied upon as an appropriate standard for the Peck machine.

& 90-2894, 1993); *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1226-28 (No. 88-821, 1991). Respondent has failed to prove its asserted defense for the reasons set out below.

The record clearly shows that there were at least two feasible methods available–light curtains and barrier guards. After the accident, Respondent installed light curtains on the machines in the facility, including the Peck machine. (Tr. 135-37). Respondent initially claimed that the light curtain destroyed the functional utility of the Peck machine because the curtain shuts the machine off every time a wire mesh panel is inserted into the rollers. *Id.* However, Respondent made modifications to the light curtain to fix this problem, that is, a foot pedal that the operator could use to restart the machine if the light curtain shut it off. (Tr. 137-38). The light curtains are still in use at the plant. (Tr. 138). In my view, this evidence establishes that the light curtain was a feasible alternative means of protecting employees from the ingoing nip point of the flattener's rollers.

The record further shows that before the accident, the other flattening machines in Respondent's facility had funnel devices on them, and that after the accident, a funnel device was installed on the Peck machine.[6] (Tr. 138-39). James Knott, Respondent's president and CEO, testified that the funnel device was installed on the Peck machine for production reasons, not safety reasons, and Paul DiMauro, the chief of maintenance, agreed. (Tr. 135-36, 371-72, 380). However, Judith Pare testified that she believed the device was put on the Peck machine for purposes of safety, not productivity. (Tr. 83). She further testified that if "all that safety stuff" (*i.e.*, the guard) was not on the machine, hands could be pulled into the rollers. (Tr. 88-89). I am persuaded by the record that the funnel device was installed on the Peck machine for safety reasons. I am also persuaded, based on the CO's testimony, that the funnel device on the Peck machine would be an effective guard if modified. The CO testified that the opening on the device could be decreased from 15/16th-inch to ½ inch and that the device could be moved further from the rollers, thereby creating an effective guard and leaving enough room to insert the wire mesh panels.(Tr. 175-77). In light of this evidence, I find that a ½-inch opening on the guard would be sufficient to insert a 16-gauge wire mesh panel and that modifying the guard in this manner would not destroy the functional utility of the Peck

[6]Although Respondent uses the term "funnel device" rather than "guard," it is clear from the record both terms refer to the device that was installed on the Peck machine, and, for purposes of this discussion, the terms will be used interchangeably. This device is identified with two circles on C-6.

machine.[7] On the basis of the evidence on the record, I conclude that Respondent has not met its burden of proving the affirmative defense of infeasibility of compliance.

In support of its asserted defense of greater hazard, Respondent points to the testimony of James Knott and Paul DiMauro that modifying the funnel device would result in fingers being amputated if the operator's hand were to be caught between the funnel device and the wire mesh panel. (Tr. 140, 365). To establish this affirmative defense, the employer must demonstrate that: (1) the hazards of complying with the standard are greater than the hazards of noncompliance, (2) alternative means of protecting employees were used or unavailable, and (3) application for a variance pursuant to section 6(d) of the Act would be inappropriate. *State Sheet Metal Co.*, 16 BNA OSHC 1155, 1159 (Nos. 90-1620 & 90-2894, 1993); *Russ Kallar, Inc.*, 4 BNA OSHC 1758, 1759 (No. 11171, 1976). I find that Respondent has not met the elements of this defense. First, based on the CO's testimony set out above, I do not find credible the testimony of Messrs. Knott and DiMauro that modifying the funnel device could result in amputated fingers. (Tr. 175-77, 182-83). Second, Respondent has not shown that alternative protective methods were unavailable; in this regard, I note the evidence about the light curtain on the Peck machine, set out *supra*. Third, Respondent presented no evidence that it applied for a variance or that application for a variance would have been inappropriate. The Commission has held that the variance requirement is very much a part of the burden of proof and that if the employer presents no evidence in this regard there is no need to inquire into the first two elements. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1022-23 (No. 86-521, 1991). Respondent's asserted defense of greater hazard is accordingly rejected.

Finally, Respondent asserts that the accident was a result of unpreventable employee misconduct. In order to demonstrate this affirmative defense, the employer must show that (1) it has established work rules designed to prevent the violation, (2) it has adequately communicated the rules to its employees, (3) it has taken steps to discover violations of the rules, and (4) it has effectively enforced the rules when violations were detected. *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979). In support of its asserted defense, Respondent points to evidence in the record that it trained its employees to hold onto the wire panel at the end furthest from the rollers and to release the panel as soon as the rollers grabbed it. (Tr. 36, 42, 48, 85-88, 99, 379). Respondent also

[7]The 16-gauge wire mesh panels flattened in the machine are 1/16th-inch in height. (Tr. 57).

references evidence that it emphasized how dangerous the machine was, and how important it was for employees to concentrate while using the machine. (Tr. 37, 39, 90-91, 94-95, 99, 350). Regardless, employee testimony clearly shows that most if not all of the employees kept their hands on the wire panels to push down on the curvature as the panels went into the rollers. (Tr. 85-87, 103-07, 324-27). Thus, even assuming *arguendo* that Respondent had established work rules to prevent accidents on the machine, it is apparent that the rules were not adequately communicated and that the company took insufficient steps to detect and enforce violations of the rules.

Respondent further maintains that Mr. Bebedelis was responsible for the accident not only because he put his hands on the panel, but also because he was not concentrating on his work. Respondent notes evidence in the record suggesting that Mr. Bebedelis was talking and yelling just before the accident. (Tr. 110-11, 119-20, 123, 337, 439). However, even if true, this evidence would not relieve Respondent of liability for the alleged violation. The record shows that it was well known that Mr. Bebedelis was a "talker" and that both management and non-management employees were aware of this fact. (Tr. 118, 349). However, despite management's knowledge, Respondent did not effectively discipline Mr. Bebedelis for his proclivity for talking and not concentrating while he was operating the flattener. (Tr. 350). Although David Geeza, the plant manager, indicated that he and Mr. Bebedelis' supervisor had orally reprimanded Mr. Bebedelis before, I find that this action was insufficient in the circumstances of this case. *Id.* Verbal reprimands for repeated violations of safety rules, without more, are unlikely to deter such conduct in the future, and Respondent has failed to show any evidence of a progressive disciplinary system to discourage employees from violating safety rules. Mr. Bebedelis' behavior was therefore not *unpreventable* employee misconduct, and I find that Respondent has not established its asserted defense.

The record demonstrates that the violation was serious, in that there was a substantial probability that the cited condition could have resulted in serious physical harm. It is undisputed that the machine was dangerous and that fingers could be broken in the flattener, and Mr. Bebedelis' accident is a clear example of the consequences of failing to properly guard the machine. This citation item is therefore affirmed as a serious violation.

Penalty Assessment

Pursuant to section 17(j) of the Act, 29 U.S.C. § 666(j), the Commission must give due consideration to four factors in assessing penalties: (1) the size of the employer's business, (2) the gravity of the violation, (3) the employer's good faith, and (4) the employer's prior history of OSHA violations. The gravity of the violation is generally the principal element in penalty assessment. *See, e.g., Trinity Indus., Inc.*, 15 BNA OSHC 1481 (No. 88-2691, 1992), and cases cited therein. The CO determined the gravity of both violations to be medium, with a greater probability of an injury occurring, and she also took into account the infrequency of the cited operation. The gravity-based penalty was then reduced due to Respondent's small size and lack of history of previous violations, but no reduction for good faith was given because of the company's failure to cooperate with OSHA during the inspection. Upon considering these factors, I conclude that the proposed penalties are appropriate. A penalty of $2,450.00 each for Items 1 and 2 of Citation 1 is therefore assessed.

ORDER

Based upon the foregoing decision, the disposition of the citation items, and the penalties assessed therefore, is as follows:

Citation 1	**Standard**	**Disposition**	**Classification**	**Civil Penalty**
Item 1	1910.138(b)	Affirmed	Serious	$2,450.00
Item 2	1910.212(a)(1)	Affirmed	Serious	$2,450.00
Total Penalties Assessed:				**$4,900.00**

/s/

G. MARVIN BOBER
ADMINISTRATIVE LAW JUDGE

Dated: 27 NOV 2000
Washington, D.C.